

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CARLOS P. VILLA,

Plaintiff,

No. CIV S-03-1737 PAN (EFB)¹

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,²

ORDER

Defendant.

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This case was administratively closed on December 15, 2003, pursuant to the previously assigned magistrate judge's approval of a stipulation and proposed order remanding the case to the Commissioner pursuant to sentence six of 42 U.S.C. § 405(g). The remand was pursuant to a stipulation of the parties that was reached once it became apparent that the defendant's Appeals Council could not locate plaintiff's claim file, which contained the recording of the hearing before the administrative law judge and his decision denying plaintiff disability benefits under

¹ Due to the retirement of Magistrate Judge Peter A. Nowinski, the Clerk is directed to reassign this case to the undersigned, and to reopen it for disposition of defendant's motion.

² On February 12, 2007, Michael J. Astrue was sworn in as Commissioner of Social Security, replacing Jo Anne B. Barnhart, the original defendant herein. Pursuant to 42 U.S.C. § 405(g) and Fed. R. Civ. P. 25(d)(1), Michael J. Astrue is substituted as the defendant in this action.

1 Titles II and XVI of the Social Security Act. The remand order directed the Appeals Council to
 2 reconstruct the evidentiary record on remand. The files were eventually located and thereafter it
 3 came to the Commissioner's attention that plaintiff's complaint had been untimely filed.
 4 Accordingly, the Commissioner returned to this court and filed a motion to dismiss or, in the
 5 alternative, for summary judgment.³ Notwithstanding the service of the motion, *see* Certificate
 6 of Service by Mail (docket no. 10-6), plaintiff, who is proceeding in this action *in propria*
 7 *persona*, failed to oppose the motion.

8 Upon review of the motion, it appears that the Commissioner's argument is well-taken.
 9 The administrative law judge issued an unfavorable decision regarding plaintiff's application for
 10 disability benefits on November 17, 2000. *See* Declaration of Paul D. Gould ("Gould Decl."),
 11 ¶ 3a. Plaintiff requested a review of the decision, and on September 13, 2002, the Appeals
 12 Counsel sent him, by mail, a notice of its decision denying his request. *Id.*; Exh. 2 thereto. That
 13 notice advised plaintiff that he had sixty days from the date of receipt of the notice in which to
 14 commence a civil action. *Id.* The notice further advised plaintiff that he could request an
 15 extension of time to commence the action, provided he clearly set forth a good reason for such
 16 extension. *Id.* Plaintiff did not file a request for an extension and did not commence this action
 17 until August 12, 2003 – more than two hundred days after the sixty-day deadline.⁴ *See* Gould
 18 Decl., ¶ 3b.

19 While the sixty-day statute of limitations is not jurisdictional, and in some cases may be
 20 equitably tolled, *see Vernon v. Heckler*, 811 F.2d 1274, 1276 (9th Cir. 1987), plaintiff has failed
 21 to oppose defendant's motion and has not met his burden to establish a grounds for equitable

22 ³ In the case of a sentence six remand, the district court retains jurisdiction over the action
 23 pending further development and consideration by the Commissioner. *See Van v. Barnhart*, 483
 24 F.3d 600, 610 n.5 (9th Cir. 2007). Accordingly, the court retains jurisdiction to rule upon
 defendant's motion.

25 ⁴ Unless otherwise shown, a claimant is presumed to have received the Appeals Council
 26 denial notice five days after the date on the notice, which in this case was September 13, 2002.
 20 C.F.R. §§ 404.901, 416.1401.

1 tolling. *See id.*, at 1277-78 (burden is on plaintiff to establish equitable tolling of the statute of
2 limitations). Under the local rules, an opposition must be filed fourteen days preceding the
3 noticed hearing date. E.D. Cal. L.R. 78-230(c). Here, however, while defendant's motion was
4 served on plaintiff, it was never noticed for hearing. In light of this, together with plaintiff's *pro*
5 *se* status and the delay in transferring this case to the undersigned, the court will provide plaintiff
6 one final opportunity to file an opposition to defendant's motion. Plaintiff shall have thirty days
7 from the date of service to file an opposition to defendant's motion. Failure to file a timely
8 opposition will be deemed a statement of non-opposition, and shall result in an order granting
9 defendant's motion. *See* E.D. Cal. L.R. 11-110, 83-183(a). If plaintiff files an opposition,
10 plaintiff may serve a reply thereto, if any, five court days thereafter, upon which filing the matter
11 will be deemed submitted. E.D. Cal. L.R. 78-230(h).

12 This order will be served on plaintiff's address of record. *See* E.D. Cal. L.R. 83-182(f)
13 and 83-183(b).

14 SO ORDERED.

15 DATED: July 11, 2008.

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EDMUND F. BRENNAN
17 UNITED STATES MAGISTRATE JUDGE
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